

SERVICE DATE – MARCH 30, 2018

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 290 (Sub-No. 394X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—IN  
AURORA, PORTAGE COUNTY, OHIO

Docket No. AB 1257X

CLEVELAND COMMERCIAL RAILROAD COMPANY, LLC—DISCONTINUANCE OF  
LEASE AND OPERATION AUTHORITY—IN AURORA, PORTAGE COUNTY, OHIO

Digest:<sup>1</sup> The Board denies the motions of the Ohio Association of Railroad Passengers to void and reject the Norfolk Southern Railway Company and Cleveland Commercial Railroad Company, LLC, verified notice of exemption jointly filed on November 13, 2017. The Board also denies the Ohio Association of Railroad Passengers' various other requests for information regarding the rail line at issue.

Decided: March 29, 2018

On November 13, 2017, Norfolk Southern Railway Company (NSR) and Cleveland Commercial Railroad Company, LLC (CCR) (collectively, Applicants), jointly filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments and Discontinuances of Service for NSR to abandon, and for CCR to discontinue service over, approximately 5.5 miles of rail line between milepost RH 22.0 and milepost RH 27.5 in Aurora, Portage County, Ohio (the Line).<sup>2</sup> Notice of the exemption was served and published in the Federal Register on December 1, 2017 (82 Fed. Reg. 57,021). On December 11, 2017, the Ohio Association of Railroad Passengers (OARP), d/b/a All Aboard Ohio and d/b/a RESTORE, a not-for-profit association, filed two separate pleadings requesting, among other things, that the Board stay the abandonment exemption; it also moved to have the notice rendered void ab initio. On December 14, 2017, Applicants jointly filed a reply opposing OARP's motions. On

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> In 2009, CCR was authorized to lease and operate the Line as part of a longer, 25.3-mile line, pursuant to an agreement with NSR. See Cleveland Commercial R.R.—Lease & Operation Exemption—Norfolk S. Ry., FD 35251 (STB served May 29, 2009).

December 28, 2017, the Board denied the stay request, imposed historic preservation and public use conditions, and stated that the Board would issue a separate decision addressing OARP's additional arguments on the merits of this discontinuance and abandonment. The exemption became effective on January 2, 2018.<sup>3</sup> This decision addresses OARP's remaining arguments on the merits of the verified notice of exemption.

## BACKGROUND

According to the verified notice of exemption, the Line satisfies the criteria for abandonment and discontinuance at 49 C.F.R. part 1152 subpart F—Exempt Abandonments and Discontinuances of Service, certifying among other things that during the past two years neither NSR nor CCR has provided local or overhead common carrier service over the Line. (Notice 3); see also Norfolk S. Ry.—Aban. Exemption—in Aurora, Portage Cty, Ohio, AB 290 (Sub-No. 394X) et al., slip op. at 1-2 (STB served Dec. 1, 2017). In its motion to reject this notice, OARP provides, without specific citation to past agency decisions, alleged additional historical information about the Line and the surrounding area. (Disclosure Motion Letter 1-2.) Among other things, OARP alleges that the Line and additional track to the east and west were known as the Randall Secondary and were owned by Consolidated Rail Corporation (Conrail). (Disclosure Motion Letter 1.) OARP states that in 1981, Conrail abandoned 22 miles of rail line located to the east of the Line, but ran local trains from Cleveland to the eastern end of the Line until 1993. (*Id.*) OARP asserts that Conrail continued to maintain the entire line until its sale to NSR in 1999. (*Id.*) OARP also says neither NSR nor CCR undertook efforts to maintain the Line (or the segment directly west of the Line). (*Id.* at 2.)<sup>4</sup>

In its motions, OARP proffers a number of arguments, statements, and requests regarding information contained in and/or allegedly missing from the Applicants' verified notice. (See generally Stay Motion, Disclosure Motion.) OARP requests that the Board find the notice void ab initio, (Stay Motion 2-3), and that the Board reject the notice and instead require a petition or application, (*id.* at 13-14). OARP asserts that NSR has not lived up to its common carrier obligation because it allowed the Line to fall into disrepair and failed to timely file for authority to discontinue and abandon service, (*id.* at 4-6). OARP further suggests that Applicants deliberately permitted the Line to fall into disrepair to restrain competition and discourage development of passenger rail. (Disclosure Motion Letter 3.) OARP claims that, despite NSR's

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<sup>3</sup> As the Board explained in December 28, 2017 decision, even though the exemption became effective, NSR was prohibited from beginning any salvage activities (including removing any tracks or ties), or consummating the abandonment until the historic review process is complete and the Board has removed the condition.

<sup>4</sup> OARP reports that the railroads permitted "vegetation to reclaim the right-of-way" and municipalities to pave over the surfaces at crossings. (Disclosure Motion Letter 2.) OARP submitted a track evaluation report explaining the current condition of the Line, noting that crossings and warning devices had been removed at several points, and describing other details. (Stay Motion 14-18.) OARP also quotes extensively several Ohio statutes without argument as to their relevance. (*Id.* at 7-11.) To the extent that OARP is implying that the condition of the track and crossings in some way violates state law, the statutes are not relevant to this decision.

actions, there is potentially significant demand for both freight and passenger service over the Line and over Conrail's previously abandoned Randall Secondary to the east of the Line (this would include the right-of-way recently purchased by the Park District). (Disclosure Motion Letter 2-3.)

Despite its statement that NSR has never run trains over the Line, (*id.* at 2), OARP seeks confirmation that there have been no movements over the Line by asking the Board to request information on shipping and train movements from NSR, (*id.* at 3-4). OARP requests that the Board require NSR to restore<sup>5</sup> the Line and parts of the long-abandoned Randall Secondary to the east. In the context of its request to restore service, OARP also asks the Board to conduct a financial fitness review of CCR to determine whether CCR would be able to operate the fully restored line. (Stay Motion 18-19.)

OARP also asks the Board to use its authority to investigate, (Stay Motion 18), and to order NSR and certain non-parties to answer a series of discovery-like requests for information about the paving of crossings and removing of rails, (*id.* at 11-13, 18); alleged negotiations between NSR and a utility company;<sup>6</sup> and the Park District's recent acquisition of the abandoned right-of-way, (Stay Motion 3, 12, 14, 18). Similarly, OARP requests information about recent surveys allegedly conducted on the Line and the former railroad right-of-way recently purchased by the Portage Park District, (Disclosure Motion 1),<sup>7</sup> and about certain marks, rods, rivets, and other survey monuments from the National Geodetic Survey (NGS), (Disclosure Motion 1). Finally, OARP requests that the Board order that NSR end all negotiations regarding sale or use of the right-of-way and order a study of the suitability of the Line, along with connecting rights-of-way, for establishment as a rail corridor for passenger service between Cleveland and Pittsburgh. (Stay Motion 19.)

Applicants argue that OARP's requests have no basis in Board regulations or case precedent. (Reply 1, Dec. 14, 2017.) In response to OARP's request that the notice be declared void ab initio, Applicants state that they were not required to disclose the information OARP is seeking as part of their verified notice filing and that they complied with all the requirements for a notice of exemption. (*Id.* at 4.) They argue that OARP's complaint is that they did not "disclose information of the type and kind that simply is not required as part of the notice of exemption process in an abandonment proceeding. The notice is not void ab initio for failure to

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<sup>5</sup> As part of the track evaluation report, OARP's track inspector provided an estimate of approximately \$3.9 million to restore the Line. (Stay Motion 17-18).

<sup>6</sup> OARP suggests in its filings that NSR is in discussions with an unspecified electric utility company to sell an easement over the right-of-way. (Stay Motion 3, 19; Disclosure Motion 1.)

<sup>7</sup> A heading in OARP's Disclosure Motion refers to seeking access to inspect for special reference, right-of-way marks, and land line marks. (Disclosure Motion 1.) However, the body of the motion makes no such request nor offers any arguments supporting such a request and, therefore, has not raised it sufficiently to be addressed by the Board here.

include [OARP's] desired scope of information.” (Id., citing CSX Transp. Inc.—Exemption—Aban.—in Fannin & Gilmer Ctys., Ga., AB 55 (Sub-No. 209X) (ICC served Dec. 18., 1987).)

Likewise, Applicants argue that removing “some signals, track, and the paving over of some crossings does not qualify as an unauthorized abandonment so as to make the notice of exemption void ab initio.” (Reply 5, Dec. 14, 2017.) They assert that “[i]t is not an unauthorized abandonment for carrier to remove certain materials relevant to rail service.” (Id. citing San Pedro R.R. Operating Co—Aban. Exemption—in Cochise Cty., Ariz., AB 1081X, slip op. at 5 (STB served Apr. 13, 2006).) Applicants also counter that they are not required to restore or rehabilitate the Line pending abandonment authorization, despite OARP’s insistence that passenger rail would be an appropriate public use for the right-of-way, (id. at 6 citing Balt. & Ohio R.R. —Aban. & Discontinuance of Serv.—in Montgomery Cty., Md. & D.C., AB 19 (Sub-No. 112) (ICC served Mar. 16, 1987)), and that there is no reason to stay the effectiveness of the exemption because no freight customers have requested rail service, (id. at 6-7). Finally, Applicants assert that OARP has not cited any regulation or precedent to support its other various motions to disclose information and take certain actions, and those requests are improper and should be denied. (Id. at 7.)

## DISCUSSION AND CONCLUSIONS

The abandonment of a rail line that has been out of service for at least two years is exempt from the prior approval requirements of 49 U.S.C. § 10903. To qualify for the exemption, a carrier (after properly notifying appropriate agencies) need only file a notice of exemption at least 50 days before it intends to abandon a particular line, and make the certifications required by 49 CFR § 1152.50(b). Applicants certified that the Line satisfies the criteria at § 1152.50(b) and thus qualifies for a two-year out of service exemption. However, if the verified notice of exemption contains false or misleading information, the carrier’s use of the exemption is void ab initio and the Board will reject the notice. 49 CFR § 1152.50(d)(3).

OARP argues that the notice should be found void ab initio, alleging Applicants concealed and obscured information and provided misleading information. OARP contends that Applicants’ filing should have revealed that the carriers allowed the track to fall into disrepair and allowed crossings to be paved over, claiming that the railroads’ “neglect” amounted to a de facto abandonment. (Stay Motion 2-3.) OARP also implies that the carriers violated their common carrier obligation because the condition of the property would have prevented them from providing common carrier service, had they been requested to do so. (Id. at 3, 4-6.) It further claims that NSR should have filed for authority to discontinue service prior to allowing the Line to fall into disrepair. (Id. at 5-6; Disclosure Motion Letter 2.)

OARP misconstrues what the Board’s regulations require. If there is no shipper actively seeking service, notwithstanding the common carrier obligation the “carrier is not required to repair or replace missing or damaged track over a portion of line that is not currently needed for rail service.” Kan. City. S. Ry.—Aban. Exemption—Line in Warren Cty. Miss., AB 103 (Sub-No. 21X), slip op. at 9 (STB served Feb. 22, 2008); see also Atchison, Topeka & Santa Fe Ry.—

Aban. Exemption—in Lyon Cty. Kan., AB 52 (Sub-No. 71X), 1991 WL 120344, at \*3 (ICC decided June 11, 1991).<sup>8</sup> Thus, the removal of signals or track or the paving over of crossings does not necessarily constitute an unauthorized abandonment or discontinuance, nor does it render the notice here void ab initio. San Pedro R.R., AB 1081X, slip op. at 5; Kan. City S. Ry., AB 103 (Sub-No. 21X), slip op. at 9. Removal of the track has no effect on the regulatory status of the line. San Pedro R.R., AB 1081X, slip op. at 5.

Nor does Applicants' failure to disclose the allegedly "concealed" information lead to the conclusion that the verified notice is void ab initio. Here, neither the condition of the Line nor the status of Applicants' alleged negotiations with the utility companies or other potential purchasers for the right-of-way is material to the exemption decision, the criteria for which Applicants have met.<sup>9</sup> See R.J. Corman R.R.—Aban. Exemption—in Clearfield, Jefferson, & Indiana Ctys., Penn., AB 491 (Sub-No. 2X), slip op. at 2 (STB served Dec. 10, 2008) (citation omitted). The focus of the inquiry under the Board's two-year out-of-service exemption regulations (49 C.F.R. part 1152, subpart F) is whether there has been any service or request for service on the line in the last two years, not the condition of the track.

OARP likens NSR and CCR's conduct here to the misleading, bad faith filings and misconduct of Railroad Ventures, Inc. (RVI) in Railroad Ventures, Inc.—Abandonment Exemption—between Youngstown, Ohio, & Darlington, Penn., in Mahoning & Columbiana Counties, Ohio, & Beaver County, Penn., Docket No. AB 556 (Sub-No. 2X). (See Stay Motion 2-3). However, the RVI proceeding is clearly distinguishable from the facts and issues here.

The RVI proceeding revolved around RVI's unlawful efforts to close an active line of railroad, salvage the track, and develop the property for non-rail purposes while active shippers remained on the line requesting service. See Railroad Ventures, AB 556 (Sub-No. 2X), slip op. at 1-4 (STB served April 28, 2008). After ultimately obtaining after-the-fact Board authority to acquire the line, RVI sought abandonment authority to remove the line from the national rail system and carry out its original plan to liquidate the property. Id. at 2. During the sale proceeding under the Board's offer of financial assistance process, not only did RVI take numerous actions to prevent the sale and encumber the property, but it also became apparent that RVI had failed to perform maintenance and had taken actions that had accelerated the deterioration of crossing safety devices, and that the line was in significant disrepair. Id. at 2-3.

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<sup>8</sup> A carrier that removes track without obtaining abandonment or discontinuance authority may be required to restore it should it receive a reasonable request for service. Vermont—Discontinuance of Service Exemption—in Chittenden Cty., Vt., 3 I.C.C.2d 903, 907 (1987), aff'd sub nom. on other grounds by Preseault v. ICC, 853 F.2d 145 (2d Cir. 1988) aff'd, 494 U.S. 1 (1990).

<sup>9</sup> OARP states that the filing should not have been a "quickie abandonment" and then provides the information it would have liked Applicants to file—information that is not required under the Board's regulations. (Stay Motion 13-14.) As discussed throughout this decision, OARP has not provided any basis for the Board to reject or void Applicants' notice of exemption.

Here, unlike in Railroad Ventures, there is no evidence that there are any current shippers on the Line, let alone any shippers that have requested service in the last two years. In fact, both Applicants and OARP acknowledge that there has not been traffic over the line for many years. Further, NSR purchased the Line with Board authority, owned it for nearly 20 years, (Notice, Ex. D at 29), and recently requested Board authority to abandon service. Finally, there has been no offer of financial assistance from any person to subsidize continued rail service or to purchase and provide continued rail service over the Line.

OARP also questions Applicants' motivation for abandonment, asserting that what it refers to as an "unauthorized abandonment"<sup>10</sup> by NSR and Conrail was intended to restrain trade and competition and discourage the development of passenger rail, (Disclosure Motion Letter 2, 3). It alleges that there are "perverse incentives for abandoning this mainline," including money from the park district and electric utilities for easement rights, (Stay Motion 3). OARP cites to census data and references local and national studies to support its arguments about the potential for passenger rail service over the Line and the previously abandoned corridor to the east (over which the Board lacks jurisdiction). (Id.; Disclosure Motion Letter 3.)

Even if the likelihood of passenger service were a relevant consideration here, the record shows that the current likelihood of future passenger service over the Line is nothing more than speculative. The Board has stated that passenger service over a line may provide reason to keep that line in the national rail network if revenue from that passenger service may make more than a de minimis amount of freight rail service feasible. Denver & Rio Grande Ry. Historical Found.—Adverse Aban.—in Mineral Cty., Colo., AB 1014, slip op. at 13-14 (STB served May 23, 2008). Here, however, there has been no showing that there is any likelihood of future freight **or** passenger rail, and accordingly, no basis for requiring Applicants to keep the Line in the national rail system. See id. at 14-15; see also Sierra Pac. Indus.—Aban. Exemption—in Amador County, CA, AB 512X, slip op at 3-4 (STB served Feb 25, 2005). For this reason, there is no basis to undertake the passenger rail suitability study that OARP requests.

OARP also discusses the potential for freight service, claiming that it looked into reinstating service over the Line and the previously abandoned connecting corridor and concluded that the potential is significant. (Disclosure Motion Letter 2.) OARP has provided no evidence, however, that there are active shippers on the Line seeking freight rail service. OARP also states that the Board should request shipment and movement data from NSR. However, OARP argues that there has not been traffic over the Line since NSR purchased it from Conrail, (Stay Motion 3-4). As there is no dispute that no movements have occurred for the past two years, there is no basis for the Board to request this information.<sup>11</sup>

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<sup>10</sup> OARP's claim that the Line was improperly "severed" when Conrail abandoned the corridor to the east, (Stay Motion 2, 5-6), even if it were relevant here, is unsupported.

<sup>11</sup> OARP also requests a financial fitness review of CCR to examine its ability to operate the fully restored line. (Stay Motion 19.) There is no basis for such a review, particularly because the Board will deny the request to fully restore service.

The Board also finds that OARP's arguments about discussions with the park district or utility companies provide no basis for voiding the notice of exemption. If there are no requests for service on a rail line, it is not inappropriate or unlawful to seek abandonment authority to allow other uses of the property. For this reason (among others), there is no basis for OARP's request for the Board to order NSR to end all easement discussions.

OARP also presents a series of discovery-like requests suggesting that the Board demand information from NSR, several municipalities, and a park district, including information about a recent land acquisition by the park district from what appears to be a private party. (Stay Motion 11-12.) Further, as noted earlier, OARP wants the Board to ask the NGS and several other entities to disclose information about the right-of-way NSR seeks to abandon and the property recently acquired by the Portage Park District, citing as an example the Board's regulation at 49 C.F.R § 1105.7(b)(10). But that regulation simply requires Applicants to serve copies of the Environmental Report on the NGS and certain other state, county, and federal agencies, in order to allow these entities to comment on the abandonment if they believe it is their interest to do so. Applicants appropriately served the Environmental Report on these agencies on approximately June 23, 2017. (See Envtl. Materials 1.) OARP relies on the same regulation and the fact that Portage Park District "placed its official letter into this abandonment exemption" in response to the Environmental Report to support its demand that the district be required to disclose its survey monuments on the previously-abandoned section of the Randall Secondary to the east of the Line. There is simply no basis for any of these requests;<sup>12</sup> which in any event are not relevant to the merits of this abandonment—i.e., whether there has been any service or request for service on the Line in the last two years.

OARP's assertions and arguments in its various motions do not justify a finding that the notice of exemption should be declared void ab initio or rejected. Nor do OARP's arguments support the many other requests it makes regarding restoring service over the Line or obtaining information from various entities. The Board will reject OARP's motions and requests and will not modify its December 28, 2017 decision in this proceeding, as amended on March 16, 2018, allowing the abandonment to become effective on January 2, 2018, subject to several conditions.

It is ordered:

1. OARP's (1) motion to render the abandonment exemption void ab initio and request for financial fitness review of CCR; (2) motion to disclose control marks, deep driven rods, and rivets of the National Geodetic Survey; (3) motion to disclose survey results, findings and

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<sup>12</sup> In addition, even if the Board were to construe OARP's demands as requests to authorize discovery, the Board disfavors discovery in abandonment proceedings absent a demonstration of both relevance and need. Ind. S.W. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind., AB 1065X, slip op. at 4 (STB served Feb. 11, 2011) (noting that the Board disfavors discovery in abandonment proceedings due to the strict time constraints and that parties seeking discovery in abandonments must demonstrate both relevance and need). OARP has not demonstrated either relevance to this proceeding or need.

measurements and identify surveyor and entry permits; and (4) various other motions and requests embedded within its December 7, 2017 filings are denied.

2. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.